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No. 99-___

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In The

Supreme Court of the United States

OLUFEMI LUKAN,

Petitioner,

v.

GLORIA SCOTT, Superintendent of North Forest Independent School District, and L.V. BRISCO, Deputy Superintendent of North Forest Independent School District,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARGARET A. HARRIS
Counsel of Record
KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Boulevard
Houston, Texas 77008
(713) 526-5677

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED*

1. Should lower courts decide disputed facts regarding an official's motive when assessing a qualified immunity defense in motive-based constitutional torts?

2. Can it ever be "objectively reasonable" to deliberately retaliate against a public employee when the retaliation violates clearly established law?

3. Does the seventh amendment limit the ability of the lower courts to make factual determinations as to motive and causation on an interlocutory appeal of the denial of qualified immunity?

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*The parties to this appeal are set out in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Olufemi Lukan respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 28, 1999.

OPINION BELOW

The July 28, 1999, opinion of the court of appeals, which is reported at 183 F.3d 342 (5th Cir. 1999), is set out at App. 1-9 of the Appendix. The opinion of the court of appeals denying petitioner's petition for rehearing, which is not reported, is set out at App. 10-11 of the Appendix.

JURISDICTION

The decision of the court of appeals denying petitioner's petition for rehearing was entered on September 26, 1999. This Petition for Writ of Certiorari is filed within 90 days of the entry of that order. This Court has jurisdiction to hear this matter under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech. . . . "

The Seventh Amendment states in pertinent part, "In suits at common law . . . the right of trial by jury shall be preserved. . . . "

Section 1 of the Fourteenth Amendment states in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

SUMMARY OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

There is a radical conflict between the circuits as to how to assess the evidence of an official's motive when determining his or her entitlement to qualified immunity in a motive-based constitutional tort case. Some, like the Fifth Circuit, find it within their jurisdiction on interlocutory appeal to weigh the evidence and make factual determinations. The Tenth and Eleventh Circuits have reached similar results. The First, Second, and Sixth Circuits, on the other hand, hold that they lack jurisdiction on interlocutory appeal to decide such questions of fact. The conflict is caused in large part, Petitioner submits, because of the complexity of the doctrine of qualified immunity and its application to different kinds of constitutional violations.

The decision by the court below violates the strict limitations placed on an appellate court's jurisdiction under the collateral order doctrine. That doctrine allows the appeal of otherwise nonfinal determinations, such as entitlement to qualified immunity, only when the issue to be resolved is completely separate from the merits of the

case. By weighing the evidence and making factual determinations as to motive and causation, the court below stepped outside this strict limitation and wrongly asserted jurisdiction over the disputed facts.

The judicially-created doctrine of qualified immunity, despite its laudable purpose, should not be allowed to supplant the Seventh Amendment's guarantee of trial by jury. This Court has long observed that factual disputes are to be resolved by juries, not judges. The Fifth Circuit's opinion violates this fundamental principle.

PROCEDURAL HISTORY

In the summer of 1997, Petitioner Olufemi Lukan applied for, and was denied, two new jobs created by his employer, the North Forest Independent School District. One was a position as the Chief Financial Officer and the other was for the position of Internal Auditor. In September 1997, Petitioner commenced this action in the 334th District Court of Harris County, Texas, against the school district and two individual defendants, Superintendent Gloria Scott and Deputy Superintendent L.V. Brisco. The petition alleged that Petitioner was denied each of these positions because he had reported serious financial improprieties within the school district's operations to the Texas Education Agency and the Harris County District Attorney's Office, and those denials violated the First Amendment to the United States Constitution, as well as the Texas Whistleblower Act.

The defendants filed an answer and then removed the lawsuit to the U.S. District Court for the Southern

District of Texas. The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1441(b), 1446(a). Following a limited amount of discovery, Respondents filed a motion for summary judgment on the basis of qualified immunity and all defendants sought summary judgment on the merits. While Petitioner filed a motion under Fed.R.Civ.P. 56(f) because additional discovery was necessary and had been blocked by the defendants, he also filed a response to the motion for summary judgment out of an abundance of caution.

The district court denied Respondents' motion for summary judgment as to all matters on December 11, 1998. On January 26, 1999, the district court denied as moot Petitioner's Rule 56(f) motion. On interlocutory appeal, the Fifth Circuit directed dismissal of the claims against Respondents on qualified immunity grounds.

FACTS

This case results from Petitioner's reports of serious financial improprieties at North Forest Independent School District, which is located in the Houston metropolitan area. Petitioner learned of these improprieties in 1997, within months after he replaced Respondent Brisco as the Director of Financial Services for the school district. Lukan reported these financial irregularities to the Texas Education Agency ("TEA") and to the Harris County District Attorney's Office. (Original Petition at 2-3).

From 1980 through June 1996, Respondent Brisco was responsible for the district's Business Office. (Lukan Aff.

at ¶ 2, Brisco Aff. at ¶ 2). Petitioner, a certified public accountant, was Brisco's subordinate for three years. He then served as Internal Auditor for the next seven years – from 1989 through July 1996. (Lukan Aff. at ¶¶ 7, 29). During that time, Lukan was responsible for conducting reviews of operations and procedures, keeping the Superintendent informed of the district's financial affairs, performing internal audits, and assisting the external auditors. (Thomas Aff. at ¶¶ 3, 8, 12). Lukan, however, had no direct authority over activities he reviewed and was not responsible for the day-to-day staff functions such as making general ledger entries or reconciling the bank accounts. (Internal Audit Charter).

The external auditors regularly voiced criticisms of the operations of Brisco's department. (Yates Aff. at ¶ 11, Lukan Aff. at ¶ 20, Thomas Aff. at ¶ 9). The most repeated criticism was the department's failure to properly reconcile the bank accounts. Year after year, the external auditors, along with Lukan, spent days and days tracing and correcting the errors. (Lukan Aff. at ¶¶ 14-20). Then-Superintendent Thomas, who supervised both Brisco and Lukan, explained that the history of problems in the district's financial records was Brisco's responsibility:

> Every year, the audit would show things that were wrong in the accounting department and there would be finger pointing. Mr. Brisco and Tony Lukan blamed each other for those problems, and there is now no doubt in my mind as to who was at fault. It was the accounting department, not Tony Lukan, who was responsible for the problems with the district's finances

> and those in the Business Office. Mr. Lukan had no responsibility for the bank reconciliations at that time. He was not supposed to be doing that staff function, Mr. Brisco and his staff were supposed to be getting those done.

(Thomas Aff. at ¶ 11). The problems in Brisco's department worsened in the last few years of Thomas' service as Superintendent. One former Board member recalls the development of the problems:

> [O]ver the last three years or so of Dr. Thomas' service to us, Mr. Brisco became less and less cooperative with both Dr. Thomas and Mr. Lukan. Mr. Brisco frequently blocked Mr. Lukan's efforts to obtain information from the Business Office. Mr. Lukan told us Board members on many occasions that he was frustrated about not getting cooperation from Mr. Brisco.

(Yates Aff. at ¶ 7). After giving Brisco the benefit of the doubt for several years, Thomas ultimately reached the conclusion that Brisco was not competent to handle these responsibilities. (Thomas Aff. at ¶ 11).

When Thomas left the district in March 1996, the Board promoted Respondent Scott to Superintendent. (Scott Aff. at ¶ 2). She, in turn, promoted Brisco to Deputy Superintendent and elevated Lukan to Director of Financial Services. (Brisco Aff. at ¶ 2, Scott Aff. at ¶ 3). It was during Lukan's first few months in this position that he discovered several unexplained financial irregularities, which he reported to TEA. (Lukan Aff. at ¶¶ 32, 34).

One of the matters investigated as a result of Petitioner's reports dealt with the wire transfer of $2.1 million of the school district's monies to a third party, T.R. Associates. (Lukan Aff. at ¶ 39). While Respondents asserted that these payments were legitimate expenses for "runoff" health insurance claims[1] and the cost of processing those claims, Lukan was unable to obtain satisfactory documentation to support such large expenditures of the district's monies. (Lukan Aff. at ¶ 39, 40). The various wire transfers that totaled $2.1 million were all approved and ordered by Respondents, and the vast majority of the money was transferred before Petitioner became Director of Financial Services. (Documents No. 00591-608).

Other matters of concern that Petitioner reported to the law enforcement agencies were: (1) Brisco and Scott had circumvented both the competitive bidding laws and the directive of the Board of Trustees on a construction project; (2) Brisco took two of the district's brand new laptop computers home, and directed his staff to not record their purchase by the district; and (3) there was a questionable financial entry in the general ledger showing over $7.3 million attributed to miscellaneous expenses. (Lukan Aff. at ¶¶ 32-35). Over the course of the next school year, TEA investigated these and other financial irregularities and the district attorney's office also began its own investigation. (Canby Depo. at 45). The school district's external auditors were involved in trying

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[1] Runoff insurance claims are those that accrue in one fiscal year but are not paid until the following year. (Scott Aff. at ¶ 4).

to uncover what became of the $2.1 million sent by wire transfer to T.R. Associates. (Lukan Aff. at ¶¶ 39-47).

After a prolonged battle, the district's auditors gained limited access to T.R. Associates' records, (Lukan Aff. at ¶ 47), but were unable to confirm that the monies were either spent appropriately or properly accounted for. (Davis & Graves Preliminary Report, Documents No. LUK00114-152). They did, however, identify several irregularities: (1) T.R. Associates invoiced (and received payment from) the district for the total medical charges on the providers' invoices, instead of the lesser amount actually paid to the providers; (2) it invoiced (and received payment from) the district for the amounts on voided checks; and (3) there were significant differences between the cancelled checks and those reported in the company's claim register. (*Id.*).

Meanwhile, TEA, with the assistance of Lukan and the district attorney's office, performed an analysis of how T.R. Associates withdrew monies from, and re-deposited monies to, its own bank accounts. (Canby Depo. at 42-61; Lukan Aff. at ¶ 47; Document Nos. LUK00153-154). This analysis did not support T.R. Associates' allegation that individual health care providers were being paid from the account into which the district's funds had been sent. Instead, it shows what could reasonably be considered as evidence of money laundering. (Yates Aff. at ¶ 34). Because the district attorney's office did not have the personnel to pursue the paper trail of money with the necessary fine-tooth comb, the Federal Bureau of Investigation took over the matter. It has yet to conclude its investigation. (Canby Depo. at 46, 66-67, 72-73).

The tension on the School Board – and between the Board and Respondents – increased dramatically over the course of the next few months. Members of the Board began asking probing questions of Respondents – and began expressing frustration, displeasure, and, ultimately, outrage at Respondents for their responses, or lack thereof, to those questions. (Yates Aff. at ¶¶ 18-19, Coleman Aff. at ¶¶ 21-22; Documents No. 002681-2682, 002925-26, 002930). In March 1997, a majority of Board members concluded that they could no longer trust Respondents and voted to suspend both of them. (Documents No. 002930, 002943). A few weeks later, on April 15, 1997, they voted to terminate Scott. (Coleman Aff. at ¶¶ 21-23; Documents No. 003014, 003018). Only a few weeks later, however, a hotly contested race for seats on the Board of Trustees led to a change in the balance of power and the then-majority voted to allow Scott and Brisco to return to work. (Yates Aff. at ¶ 27, Coleman Aff. at ¶¶ 23-24).

Upon her return to the district, Scott directed that all financial matters be handled by Respondent Brisco and the two consultants who were then helping the district get caught up on bank reconciliations and other problems. (Lukan Aff. at ¶ 65). No reason for this decision was given. Shortly thereafter, Scott made the decision to place a "Chief Financial Officer" over the financial affairs of the district, essentially replacing the position held by Lukan as the Director of Financial Services. To accomplish her goals, Scott formed an ad hoc "screening committee," hand-selected its members, and reserved the position of committee chair to herself. That committee then interviewed various candidates, including Lukan.

As Scott later reported to the Board, both she and her committee recommended someone other than Lukan to fill this "new" position. The Board accepted her recommendation. As one Board member explained,

> the majority of the Board voted to do whatever Dr. Scott wanted about the Chief Financial Officer. She had just returned from being put on leave as a result of our earlier decision to terminate her services – and the balance of power on the Board had changed such that four of the Board members now supported her.
>
> We all knew that Dr. Scott did not like Mr. Lukan. We knew that Dr. Scott had so much resentment of Mr. Lukan that she just would never work with him. And I know that she did not like him because he reported problems to the TEA – problems to do with the wire transfer of over $2 million to T.R. Associates, the laptops that Mr. Brisco had taken home for which he did not repay the district (until the TEA made him) for having caused their loss, and how she had handled the ROTC building and the expansion program at the Administrative Building.

(Yates Aff. at ¶ 27). Lukan was then demoted to Fixed Assets Accountant, a title later changed to "Director".

Next, Scott decided that the district should again have an Internal Auditor, a position she had left vacant when Lukan was promoted the previous summer. The same committee was used to fill this position and Scott and the committee again recommended someone other than Lukan for the position, even though that individual

was not a certified public accountant. Scott's recommendation was adopted by the Board on this matter as well. As a now-former Board member explained:

> Based on all my discussions with other members of the Board, my discussions with Dr. Scott, and my knowledge of the history of how things operated within the District, I believe that Mr. Lukan's reporting of financial irregularities (which could have also been violations of the law) to the TEA influenced the Board's vote to deny him the positions of Chief Financial Officer and Internal Auditor. I believe this because Dr. Scott clearly resented him for having made that report and the Board did not exercise independent judgment when the decisions were made to fill those two positions.

(Yates Aff. at ¶¶ 28, 29).

Ironically, despite his more than 15 years of responsibility for the district's financial affairs, Brisco became Deputy Superintendent for the district. Lukan, who reported questionable transactions involving millions of dollars of district funds, on the other hand, was demoted and his office moved to a remote location a quarter of a mile away from the books and records he uses for his job. (Lukan Aff. at ¶ 71).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. There is a Conflict in the Circuits on How to Assess Factual Disputes as to an Official's Intent When the Question of Qualified Immunity is Raised on Interlocutory Appeal

There is a radical conflict between the courts of appeals as to how they should regard factual disputes as to an official's intent in motive-based constitutional tort cases when the trial court denies qualified immunity and an interlocutory appeal is taken. This conflict preceded, and has followed, this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). While *Crawford-El* was not itself a decision as to whether the official in question was entitled to qualified immunity, it established two things. First, in an interlocutory appeal of the denial of qualified immunity, it did not prohibit the lower courts from addressing questions of subjective intent when that is an essential element of the plaintiff's case. Second, despite the laudable purpose behind the qualified immunity doctrine, the courts may not require "clear and convincing" evidence of an unlawful motive in response to a qualified immunity defense. The courts of appeals have diverged in their interpretation of this holding.

The Fifth Circuit, in the instant case, takes the view that it has jurisdiction on interlocutory appeal to weigh the evidence and make its own determination as to whether the plaintiff has sufficient proof of (a) the actor's subjective intent and (b) whether that intent caused the adverse action. Along similar lines, the Eleventh Circuit takes the position that it has jurisdiction on interlocutory appeal to (a) weigh the evidence, (b) make a factual

determination that there were mixed motives for the challenged action (one lawful and the other not), and (c) decide that, because one was lawful, the official was entitled to qualified immunity. *Brown v. Cochran*, 171 F.3d 1329, 1333 (11th Cir. 1999).

In its own unique perspective on qualified immunity, the Tenth Circuit found that it had jurisdiction to weigh the evidence as to unlawful motivation. It then determined that the plaintiff did not prove that his speech was a motivating factor in his termination, and, due to that failure, he had not met "the first prong of the qualified immunity standard." *Butler v. City of Prairie Village*, 172 F.3d 736, 746 (10th Cir. 1999).

In direct contrast to *Lukan*, the Sixth Circuit held in *Hoard v. Sizemore*, 1999 U.S. App. LEXIS 29961 (6th Cir. November 17, 1999) that, even though the official argued that his decision to terminate the plaintiffs was objectively reasonable given the dire financial circumstances of the county, a factual question remained as to whether he was motivated "by budgetary concerns or by the political affiliation of the plaintiffs" *Id.* at *9. Finding this question outside its jurisdiction, the court refused to entertain it. *Id.* The Second Circuit similarly held in *Davidson v. Chestnut*, 193 F.3d 144 (2nd Cir. 1999) that, even if the evidence regarding causation was "one-sided," the appellate court cannot decide matters of "evidence sufficiency" on an interlocutory appeal. Likewise, the First Circuit held in *Guilloty-Perez v. Fuentes-Agostini*, 1999 U.S. App. LEXIS 30549 (1st Cir., November 19, 1999) that it lacked jurisdiction to hear an interlocutory appeal on the denial of qualified immunity because the resolution depended upon an assessment of the actions and motives of the

defendants and whether they would have taken the same actions irrespective of the plaintiff's speech.

This conflict in the circuits requires resolution. Persons suffering retaliation for engaging in conduct clearly protected by the Constitution are finding that the outcome of their efforts to seek redress depends, not so much on what the facts of their situations are, but more so on the part of the country in which the redress is sought.

This conflict also demonstrates the need to reconcile the various opinions by this Court that have dealt with the question of qualified immunity. The complexity of the doctrine is, in large part, responsible for this confusion. Qualified immunity is a judicially-created defense and its contours and application have changed over the years. A brief look at the critical decisions is necessary.

The shaping of the current dilemma began with this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There, the Court ruled that, when a constitutional violation is alleged against a governmental official, that individual is entitled to qualified immunity if the law was not "clearly established" at the time. The question is whether "a reasonable person" would have known that the conduct at issue violated a clearly established right, 457 U.S. at 817-818, and is often referred to as "the objective reasonableness test." The test should be applied, the Court stated, not only to preclude liability, but also to protect government officials from the rigors and expenses of trial.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court held that, in order to implement *Harlow*'s decision that an individual entitled to qualified immunity should be able to avoid trial, an official is allowed to seek immediate review of a district court's denial of qualified immunity by way of an interlocutory appeal. The collateral order doctrine could be used as a vehicle for appeal, the Court held, so long as the matter to be resolved would: (1) conclusively determine a disputed question, (2) resolve an important issue completely separate from the merits of the case, and (3) be effectively unreviewable on appeal from a final judgment.

Next, in *Johnson v. Jones*, 515 U.S. 304 (1995), this Court ruled that, if the determination of whether an official is entitled to qualified immunity depends on an assessment of facts (there, the personal involvement of three police officers in the plaintiff's beating), an appellate court would not have jurisdiction on interlocutory appeal. The appellate court's determination, it explained, would require that it review the sufficiency of the evidence, which it may not do on an interlocutory appeal. 515 U.S. at 313.

Crawford-El v. Britton followed. This decision has been both lauded as marking "the first time that the United States Supreme Court has treated and applied qualified immunity in a realistic litigation fashion," M. Schwartz, *Section 1983 Litigation – Supreme Court Developments, Symposium: The Supreme Court and State and Local Government Law – the 1997-98 Term*, 15 TOURO L.REV. 859, 877 (1999), and criticized as failing to "directly address the more complex question of how the *Harlow* test for qualified immunity should be applied once inquiry into

the defendant's subjective intent is permitted." L. Eskow & K. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the "Specter of Subjective Intent that Haunts Objective Legal Reasonableness"*, 50 BAYLOR L.REV. 869, 871 (1998).

While the Court in *Crawford-El* recognized the problems of applying *Harlow*'s "objective reasonableness" test in motive-based constitutional tort cases, and the need to make factual determinations as to why an official acted as he or she did, it did not resolve who should make that determination, when it should be made, or how. The writ of certiorari should be granted to resolve these questions.

II. The Decision of the Court Below Violates the Limitations of An Interlocutory Appeal Under the Collateral Order Doctrine

Without regard to whether there is a conflict in the circuits, another problem with the Fifth Circuit's opinion is that the court ignored the boundaries of the collateral order doctrine. Because of the possibility for countless appeals from every decision by the trial court, the collateral order doctrine allows appeals of "nonfinal" orders in only a very few situations. A central requirement is that the matter presented on appeal be separable from the merits of the case in chief. The Fifth Circuit totally ignored this limitation on its jurisdiction, and made factual, and thereafter legal, determinations that went straight to the heart of the merits of Lukan's case.

The reason for this error, Petitioner submits, is that there are two approaches to the question of entitlement to qualified immunity: one is based primarily on the Fourth

Amendment under which the plaintiff generally does not need to prove an unlawful motive on the part of the official; and the other is for motive-based constitutional torts that typically arise under the First or Fourteenth Amendments. *Compare County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (whether the police officer's highspeed chase of a motorcycle when the driver refused to halt, which chase resulted in a passenger's death, violated clearly established law) with *Crawford-El* (whether a prison official's desire to retaliate against a prisoner for his First Amendment speech to which she took exception is what motivated her decision to delay his receipt of legal papers).

The decision on qualified immunity in *County of Sacramento* could be made on interlocutory appeal because the actor's subjective intent was irrelevant and the appeal turned, not on the facts, but rather on whether a reasonable officer in the defendant's shoes would have known that it was a violation of the passenger's rights to chase the motorcycle. In *Crawford-El*, on the other hand, the determination of qualified immunity would turn on why the defendant acted as she did – was it because she had a personal dislike of the prisoner in general, or was it because she wanted to get back at him for tricking her into allowing him to speak with a newspaper reporter? One approach is used when subjective intent is irrelevant and the other when it is an issue in the plaintiff's case.

The error by the court below was to apply both approaches in their entirety to this case. It stated a two-step analysis of whether an official is entitled to qualified immunity. First was the standard test: if the official's

conduct did not violate a clearly established constitutional right, the official is entitled to qualified immunity. (App. 6). It then added a second prong to the test: "even if the official's conduct violated a clearly established constitutional right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable." (*Id.*). The addition of this second prong was, Petitioner contends, erroneous.

Even when applying the first prong, though, the Fifth Circuit erred by weighing the evidence and making fact determinations as to motivation. The court began by stating the evidence in favor of Lukan's claim of unlawful motive:

> Lukan presented evidence of retaliation by Scott, asserting that Scott removed tax and purchasing responsibilities from his control and that she also recommended not renewing Lukan's employment contract. Lukan also suggested that Scott had a motive to retaliate against Lukan because his speech led to Scott's temporary suspension and termination. Further, Lukan contends that as the head of the hiring committee, Scott had the opportunity to make negative comments and direct the interviewing committee to select candidates other than Lukan for the chief financial officer and internal auditor positions.

(App. 7-8). Despite this evidence and the logical inferences therefrom, the court nonetheless concluded that Lukan had failed to prove that an unlawful motive led

Respondents[2] to take adverse employment actions against him. It reached this conclusion based on affidavits presented by not yet deposed committee members who denied any knowledge of his protected speech.[3] (*Id.*)

As to the second prong, the court below asserted in the alternative that Respondents would have made the same decisions regardless by attributing the district's "severe financial problems" to Lukan's job performance. (App. 8-9). This decision was not based on undisputed facts, but rather required the court to accept as true all facts asserted by Respondents. This alone is error. More importantly, however, the lower court's rationale would, as the Sixth Circuit observed, "immunize all defendants in cases involving motive-based constitutional torts, so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds." *Hoard v. Sizemore, supra*, 1999 U.S. App. LEXIS 29961 at *35.

While the court did not specifically say so, the source of the second prong was this Court's ruling in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), which was neither a qualified immunity case nor one resulting from

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[2] The court below mistakenly concluded that Lukan had dropped his claims against Brisco. (App. 7). Lukan was merely unable to fully contest Brisco's appeal because he had not conducted sufficient discovery before he was required to respond to the motion for summary judgment. Hence, his Rule 56(f) motion.

[3] *Compare Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) ("A committee of this sort, even if it is not just a liability shield invented by lawyers, is apt to defer to the judgment of the man on the spot.").

an interlocutory appeal. There, the district court found that the teacher's communication to the radio station was protected by the First and Fourteenth Amendments and played a "substantial part" in the board's decision to not renew his contract. This Court observed, however, that that finding alone would not necessarily amount to a constitutional violation justifying remedial action if the board, in fact, would have reached the decision to not renew the contract in any event. 429 U.S. at 285. It held that the burden fell on the school district to prove by a preponderance of the evidence that it would have taken the same action regardless and remanded the matter because it could not ascertain whether the lower courts had applied the proper test.

The court below may have confused the *Mt. Healthy* decision as standing for the proposition that the assessment of the evidence was a question of law. That is not, however, a correct reading of *Mt. Healthy*. *Mt. Healthy*'s remand for the lower court's reconsideration of the facts was not because the resolution was a question of law, but instead because the trial court had also served as the trier of fact. *Mt. Healthy* was a bench trial, not an interlocutory appeal of the denial of qualified immunity.

The court below was therefore in error to rely on *Mt. Healthy* in reaching its decision that it had jurisdiction to decide the weight of the evidence as a question of law.

III. The Review of An Official's Entitlement to Qualified Immunity Must Yield to the Seventh Amendment's Guarantee to Trial By Jury

The concept of qualified immunity as a defense to liability is one created by the judiciary. While its goal of preventing government officials from having to defend against frivolous claims is of considerable importance, adherence to that doctrine must not be allowed to supplant the guarantee of the Seventh Amendment to the U.S. Constitution.

As was recently observed by Justice Scalia, the historical preference is for judges to resolve legal questions while juries make primarily factual determinations:

> [This] fact-law dichotomy is routinely applied by the lower courts in deciding § 1983 cases. For instance, in cases alleging retaliatory discharge of a public employee in violation of the First Amendment, judges determine whether the speech that motivated the termination was constitutionally protected speech, while juries find whether the discharge was caused by that speech.

City of Monterey v. Del Monte Dunes, 526 U.S. 687, ___, 119 S.Ct. 1624, 1649 (1999) (Scalia, J., concurring in part and concurring in the judgment) (citing *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265, 1271 (10th Cir. 1998)).

A suit under 42 U.S.C. § 1983 seeking legal relief is an action at law within the meaning of the Seventh Amendment. 526 U.S. at ___, 119 S.Ct. at 1638. Because claims brought pursuant to § 1983 sound in tort, this Court concluded, an individual seeking redress for an invasion

of his right under federal law must be afforded the same rights as those who seek redress for interference with protected personal or property interests. 526 U.S. at ___, 119 S.Ct. at 1638. This includes the right to have the jury, rather than the judge, determine the question of liability. 526 U.S. at ___, 119 S.Ct. at 1642.

This holding is consistent with other decisions by the Court over the years. If it is a factual dispute, it must be resolved – and it must be resolved by the finder of fact. At the summary judgment stage, after all, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The cold record cannot reveal a witness' discomfort, a telling pause before answering a difficult question, or the posture of the individual on the witness stand when confronted with inconsistent statements. And, few persons accused of violating someone's rights will actually confess to the misdeed. As this Court once observed, "There will seldom be 'eyewitness' testimony as to the employer's mental processes," and therefore employment discrimination need not be proved by direct evidence. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). The importance of circumstantial evidence, which a jury considers, was summed-up in a vivid quote from a well-known trial lawyer on the probative value of circumstantial evidence:

> We better know there is a fire whence we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot.

Hopkins v. Andaya, 958 F.2d 881, 888 (10th Cir. 1992) (quoting Abraham Lincoln).

Writ of certiorari should therefore also be granted because the court below weighed the evidence as to credibility and motive and made a factual determination as to the question of causation. Petitioner respectfully submits that the appellate court was in error and that its action improperly invaded the province of the jury reserved to it by the Seventh Amendment to the U.S. Constitution.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MARGARET A. HARRIS
Counsel of Record
KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Boulevard
Houston, Texas 77008
(713) 526-5677

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-21158

OLUFEMI ANTHONY LUKAN,

Plaintiff-Appellee,

VERSUS

NORTH FOREST ISD; et al.,

Defendants,

GLORIA S. SCOTT, L.V. BRISCO,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jul. 28, 1999)

Before EMILIO M. GARZA, DeMOSS and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Olufemi Lukan filed suit against the North Forest Independent School District, Dr. Gloria S. Scott, and L.V. Brisco, alleging a free speech retaliation claim under 42 U.S.C. § 1983 and a state law claim under the Texas Whistleblower Act. The district court denied the Appellants' motion for summary judgment on the ground of qualified immunity. We reverse.

I. FACTS AND PROCEEDINGS

Lukan was first employed by the North Forest Independent School District ("NFISD") in 1986. Initially, he worked as an accounting supervisor for three years under L.V. Brisco in the district's business office. In 1989, Lukan was promoted to the district's internal auditor position, where he [sic] responsible for informing the superintendent of the district's financial affairs and working with external auditors on audits for the year.

In April, 1996, Dr. Gloria S. Scott succeeded Dr. Carroll Thomas as the NFISD superintendent. In July, 1996, Scott reorganized the entire NFISD administrative office. As a part of the reorganization, Lukan, on Scott's recommendation and the school board's approval, was appointed to the newly created position of director of financial services. At this time, Scott contracted with an independent public accounting firm, Saul & Pechacek, to audit the district's finances.

In August, 1996, Lukan discovered financial improprieties in the business office. Lukan was confronted with requests from Scott and Brisco for payments to a construction company that appeared to circumvent the competitive bidding process. Lukan also found that two laptop computers disappeared from the district that were reported stolen from Brisco's home during a burglary. Brisco's personal insurance paid him for the loss of the computers and he had not yet paid the district for the losses. In addition, Lukan discovered a questionable financial entry showing $7.3 million attributed to a miscellaneous expenditures account. Finally, Lukan noticed that Scott and Brisco had approved questionable wire

transfers of nearly $2.1 million to a third party with little or no documentation. As a result, Lukan reported the suspected financial improprieties to the Texas Education Authority ("TEA") and the Harris County district attorney's office.

The record reflects that the district had a considerable number of financial problems in addition to the suspected improprieties that Lukan discovered. In September, 1996, Scott received the special audit report from Saul & Pechacek which was critical of the district's finances. The report noted that the district's bank accounts had not been reconciled in approximately five years and criticized Lukan's job performance for failing to inform the superintendent of the district's financial situation and failing to conduct audits of the reconciliations. In October, 1996, in response to Lukan's whistleblowing, the TEA sent auditors to the district to investigate the finances. The TEA auditors cited numerous problems with the district's finances and accounting. In March 1997, as a result of the TEA investigation, Scott and Brisco were suspended by the NFISD Board of Trustees, and in April, Scott was terminated. Scott and Brisco were later reinstated when the composition of the board changed as a result of a new board election.

In April, 1997, the TEA again visited the district to evaluate the 1997 fiscal year (September, 1996 – August, 1997) budget. In this evaluation, the TEA recommended external consultants to improve the financial state of the district, and further, stated that the district needed to reorganize the business office. The external consultants also were critical of Lukan's job performance. In June,

1997, upon TEA's recommendation, the district reorganized the business office, creating three new positions, a chief financial officer, an internal auditor, and a director of fixed assets. Lukan applied and interviewed for the chief financial officer position with five other candidates. After evaluating and ranking each of the candidates on a numerical system, Lukan was not selected by a four-member interviewing committee for the chief financial officer position. Because the chief financial officer position encompassed Lukan's old job, the director of financial services, Lukan was reassigned to a position with the same pay as the director of fixed assets position. Lukan also applied for the internal auditor position. The committee again recommended another applicant.

In September, 1997, Lukan filed suit under 42 U.S.C. § 1983 asserting a violation of his First Amendment rights, and further, asserting violations of the Texas Whistleblower Act. *See* Tex. Gov't Code Ann. § 554.002 (Vernon Supp. 1999). Defendants filed motions for summary judgment on the basis of qualified immunity. The district court denied defendants' motions.

II. DISCUSSION

A. Appellate Jurisdiction

Before reaching the merits, we must determine whether we have appellate jurisdiction in this interlocutory appeal. The district court denied Appellants' motion for summary judgment on the ground that "several material fact issues" existed. We conclude that the district

court's denial of summary judgment on the basis of qualified immunity was based on a conclusion of law and that we possess jurisdiction to hear this appeal.

"District court orders denying summary judgment on the basis of qualified immunity are immediately appealable under the collateral order doctrine, notwithstanding their interlocutory character, when based on a conclusion of law." *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). An order is purely legal where it concerns only the application of established legal principles to a given set of facts. *See Johnson v. Jones*, 515 U.S. 504, 513-14 (1995). The existence of disputed issues of material fact does not necessarily preclude review of the case. *See Wren v. Towe*, 130 F.3d 1154, 1157 (5th Cir. 1997). A petitioner may "claim on appeal that all of the conduct which the District Court deemed sufficiently supported for the purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' " *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996)). *See also Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Appellants claim that they are entitled to qualified immunity as a matter of law because the facts at issue do not constitute a clearly established violation of federal law or, in the alternative, that their actions were objectively reasonable. As we are addressing conclusions of law, we may exercise appellate jurisdiction over this interlocutory appeal.

B. Standard of Review

This Court reviews the district court's denial of a motion for summary judgment based on qualified immunity *de novo*. *See Benningfield v. City of Houston*, 157 F.3d 369, 374 (5th Cir. 1998). Summary judgment shall be entered in favor of the moving party if the record, taken as a whole, "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" where a reasonable party could return a verdict for the nonmoving party. *See Crowe v. Henry*, 115 F.3d 294, 296 (5th Cir. 1997). If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986).

C. Qualified Immunity

The sole issue on interlocutory appeal is whether Appellants were entitled to qualified immunity from Lukan's § 1983 claim for the alleged violation of his First Amendment rights. In determining whether a public official is entitled to qualified immunity under § 1983, we apply a two-step analysis. First, if the official's conduct did not violate a clearly established constitutional right, the official is entitled to qualified immunity. *See Jones v. Collins*, 132 F.3d 1048, 1052 (5th Cir. 1998). Second, even if the official's conduct violated a clearly established constitutional right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable. *See id.*

A First Amendment retaliation claim must include facts showing that: (1) the employee suffered an adverse employment decision; (2) the employee's speech involved a matter of public concern; (3) the employee's interest in commenting on matters of public concern outweighs the defendants' interest in promoting efficiency; and (4) the employee's speech must have motivated the defendants' action. *See Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999). If the plaintiff carries this burden, then the defendant must show, by a preponderance of the evidence, that it would have taken the same action against the plaintiff even in the absence of the protected conduct. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-87 (1977); *Brady v. Houston Indep. Sch. Dist.*, 113 F.3d 1419, 1423 (5th Cir. 1997).

At the outset, we note that Lukan has abandoned his First Amendment retaliation claim against Brisco. Lukan has not presented any evidence that Brisco retaliated or conspired against Lukan. With respect to Scott, the parties do not dispute that Lukan suffered an adverse employment decision, the speech involved was a matter of public concern, and the matters of public concern outweighed interests in efficiency. Thus, we consider only whether Lukan's speech motivated Scott's actions.

Lukan's evidence fails to establish a causal connection between the speech and the adverse employment actions that he alleges. Lukan presented evidence of retaliation by Scott, asserting that Scott removed tax and purchasing responsibilities from his control and that she also recommended not renewing Lukan's employment contract. Lukan also suggested that Scott had a motive to retaliate against Lukan because his speech led to Scott's

temporary suspension and termination. Further, Lukan contends that as the head of the hiring committee, Scott had the opportunity to make negative comments and direct the interviewing committee to select candidates other than Lukan for the chief financial officer and internal auditor positions.

Our review of the record, however, shows that the interviewing committee responsible for selecting the job candidates did not retaliate against Lukan. The interviewing committee members testified in affidavits that they did not have any knowledge of Lukan's whistleblowing activities against Scott. Lukan has not alleged, nor can we find, any evidence that the committee's process was tainted or harbored any illegal motives. The interviewing committee ranked Lukan and other candidates for the chief financial officer and internal auditor positions on a numerical-based system using a series of identical questions posed to each candidate. The committee recommended the highest scoring candidates for the chief financial officer and internal auditor positions to the NFISD board. The NFISD, in turn, hired the recommended candidates. Lukan has failed to establish a causal connection between his speech and the alleged retaliatory conduct.

Moreover, our review of the record shows that even if Lukan established that his speech motivated their conduct, the defendants would have taken the same action. The district was suffering from severe financial problems prior to and during Scott's tenure as the superintendent. Multiple audits of the business office showed ongoing performance problems such as failures to conduct bank reconciliations, unrecorded checks and deposits, and

large budget deficits. The September, 1996, special audit report was critical of the business office staff and the failures to reconcile the bank accounts. The October, 1996, TEA evaluation highlighted a number of financial and accounting problems in the district, and further, recommended external auditors and reorganization of the business office. The external auditors found the district's financial records "the worse they had ever seen." In light of Lukan's job performance and the critical state of the district's finances, the Appellants would have taken the same action in the absence of Lukan's protected conduct. Thus, Appellants did not violate Lukan's constitutional rights and were entitled to qualified immunity.

III. CONCLUSION

Based on the foregoing reasons, the district court's denial of summary judgment for Appellants is REVERSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-21158

OLUFEMI ANTHONY LUKAN

Plaintiff – Appellee

v.

NORTH FOREST ISD; ET AL

Defendants

GLORIA S SCOTT; L V BRISCO

Defendants – Appellants

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Sept. 27, 1999)

Before EMILIO M. GARZA, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by appellee Olufemi Anthony Lukan in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL
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MANDATE